(1)

Supreme Court, U.S.
FILED

No. 04-871

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IN THE SUPREME COURT OF THE UNITED STATES

EXUM WALKER,
Petitioner,

v.

JAMES CROSBY,
Secretary, Florida Department of Corrections, and
CHARLIE CRIST,
Attorney General of the State of Florida
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is it a denial of a constitutional right for a conviction to be based on a general verdict of guilty as charged when the charging document was duplicitous, said duplicity going unnoticed until post conviction, and the state of jurisdiction requires a unanimous jury verdict to convict, and if so, is it error for the Circuit Court to deny a federal habeas petitioner raising this issue a certificate of appealability based on a failure to make a substantial showing of the denial of a constitutional right.

II. Is it a denial of a constitutional right when, during a trial, after the state and defense have both rested and no evidence has been presented to support conviction of the crime charged, the state changes the charge to a distinctly different crime with identical penalty that evidence was presented to support conviction, and if so, is it error for the Circuit Court to deny a federal habeas petitioner raising this issue a certificate of appealability based on a failure to make a substantial showing of the denial of a constitutional right.

III. Is it a denial of a constitutional right when the law of the state makes possessing one or more of specific items statutorily a single crime, and the state charges one possessing such items with a separate crime for each item possessed, and the trial court refuses to accept the accused's proper plea to a single count of possessing these items, instead forcing him to plead to multiple counts, and if so, is it error for the Circuit Court to deny a federal habeas petitioner raising this issue a certificate of appealability based on a failure to make a substantial showing of the denial of a constitutional right.

IV. Is it a denial of a constitutional right when a defendant receives two concurrent 30 year probationary sentences on crimes with a statutory maximum sentence of 15 years, and according to state law, any probation beyond a statutory maximum is unenforceable so that the defendant effectively has 15 years of probation to serve, but when he attempts to correct the

excessiveness, the court changes the probationary sentences from concurrent to consecutive, so that defendant has to serve a full 30 years of probation, a sentence 15 years harsher than his original sentence, and if so, is it error for the Circuit Court to deny a federal habeas petitioner raising this issue a certificate of appealability based on a failure to make a substantial showing of the denial of a constitutional right.

V. Is it a denial of a constitutional right when the charges against a defendant are alleged to have occurred during a range of dates, and defendant gets the state to further reduce that range of dates through a statement particulars, and then during trial, no evidence is presented to establish one of the dates, and if so, is it error for the Circuit Court to deny a federal habeas petitioner raising this issue a certificate of appealability based on a failure to make a substantial showing of the denial of a constitutional right.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

CORPORATE DISCLOSURE

No corporations or subsidiaries are involved here.

TABLE OF CONTENTS

Questions Presented i

List of Parties iii

Corporate Disclosure iv

Table of Contents v

Table of Authorities vii

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 7

Reasons for Granting the Writ 8

Conclusion 28

Index to Appendices vi

INDEX TO APPENDICES

APPENDIX A – Opinion of the United States Count of Appeals for the Eleventh Circuit in *Exum Walker v. James Crosby*, Case No. 04-11234-E, issued on June 15, 2004

APPENDIX B – Justice Kennedy's Order of September 23, 2004, extending the time for filing the petition for writ of certiorari until October 29, 2004.

APPENDIX C – Florida Statute 800.04, 1987

APPENDIX D – Florida Statute 827.071, 1987

APPENDIX E – Florida Standard Jury Instructions – Lewd Assault – 1987

APPENDIX F – *State v. Watts*, 462 So.2d 813 (Fla. 1985)

APPENDIX G – *Lifka v. State*, 530 So.2d 371 (Fla. 1st DCA 1988)

TABLE OF AUTHORITIES

CASES:

Andersen v. United States, 170 U.S. 481 (1898) 11

Apprendi v. New Jersey, 530 U.S. 466 (2000) 18

Artuz v. Bennett, 531 U.S. 4 (2000) 7

Bins v. United States, 331 F.2d 390 (5th Cir.), *cert. denied*, 379 U.S. 880, 85 S. Ct. 149, 13 L. Ed. 2d 87 (1964) ... 12

Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932) 12

Borum v. United States, 284 U.S. 596 (1932) 11

Caballero v. Hudspeth, 114 F.2d 545, 547 (10th Cir. 1940) 13

Cochran v. United States, 157 U.S. 286, 290, 15 S.Ct. 628, 39 L.Ed. 704 (1895) 17, 27

Cole v. Arkansas, 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 644 (1948) 16

DeBenedictis v. Wainwright, 674 F.2d 841 (11th Cir. 1982) 18

Ex Parte Bain, 121 U.S. 1, 5-14, 7 S.Ct. 781, 30 L.Ed. 849 (1887) 18

Ex parte Lange, 85 U.S. 163, 21 L. Ed. 872 (1874) 24

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 26

Lifka v. State, 530 So.2d 371 (Fla. 1st DCA 1988) 15

Markham v. United States, 160 U.S. 319, 16 S. Ct. 288, 40 L. Ed. 441 (1895) 16

Mars v. Mounts, 895 F.2d 1348 (11th Cir. 1990) 26

Morgan v. Devine, 237 U.S. 632, 35 S. Ct. 712, 59 L. Ed. 1153 (1915) 12

North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct 2072, 23 L.Ed.2d 656 (1969) 23

Patton v. United States, 281 U.S. 276, 50 S. Ct. 253, 74 L. Ed. 854 (1938) 1, 3, 10

Rose v. State, 507 So.2d 630, 631 (Fla. 5th DCA 1987) 16

Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) 17, 27

Schad v. Arizona, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) 11

The Schooner Hoppet and Cargo v. United States, 11 U.S. 389, 7 Cranch 389, 3 L. Ed. 380 (1813) 16

Sincox v. United States, 571 F.2d 876 (5th Cir.1978) 11

St. Clair v. United States, 154 U.S. 134, 145 (1894) 11

State v. Beamon, 298 So.2d 376, 379 (Fla. 1974), *cert denied*, 419 U.S. 1124, 95 S.Ct. 809, 42 L.Ed.2d 824 (1975) 26

State v. Watts, 462 So.2d 813 (Fla. 1985) 5, 20

Stein v. Reynolds Securities, Inc., 667 F.2d 33 (11th Cir. 1982) 18

Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960) 16

Sullivan v. Louisiana, 508 U. S. 275, 113 S.Ct. 2078, 124 L. Ed. 2d 182 (1993) 25

Taylor v. State, 702 So.2d 487 (Fla. 1997) 23

United States v. Ballard, 322 U.S. 78, 90, 64 S.Ct. 882, 88 L.Ed. 1148 (1944) 18

United States v. Blandford, 33 F.3d 685 (6th Cir. 1994) 10

U.S. v. Burton, 871 F.2d 1566 (11th Cir. 1989) 10

United States v. Correa-Ventura, 6 F.3d 1070 (5th Cir. 1993) 11

United States of America v. Diaz, 190 F.3d 1247 (11th Cir. 1999) 17

United States v. Gaudin, 115 S. Ct. 2310, 515 U. S. 506, 132 L. Ed. 2d 444 (1995) 26

United States v. Goodwin, 457 U.S. 368, 102 S.Ct 2485, 73 L.Ed.2d 74 (1982) 24

United States v. Gordon, 844 F.2d 1397 (9th Cir. 1988) 10

United States v. Jackson, 390 U.S. 570, 88 S.Ct 1209, 20 L.Ed.2d 138, (1968) 21

United States v. Kinsley, 518 F.2d 665 (8th Cir. 1975) . . . 5, 20

United States v. London, 550 F.2d 206 (5th Cir. 1977) 18

United States v. Marshall, 75 F.3d 1097 (7th Cir. 1996) 10

United States v. Miller, 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985) 17

United States v. Morales-Rosales, 838 F.2d 1359 (5th Cir. 1988) 18

United States v. Norris, 281 U.S. 619, 50 S.Ct. 424, 74 L.Ed. 1076 (1930) 18

United States v. Rosenbarger, 536 F.2d 715 (6th Cir. 1976), *cert. denied*, 431 U.S. 965, 53 L. Ed. 2d 1060, 97 S. Ct. 2920 (1977) 5, 20

United States v. Willis, 75 F.Supp. 628 (D.C. 1948) 21

STATUTES AND RULES:

Florida Rule of Criminal Procedure 3.140(j), (1987) 4, 16

Florida Rules of Criminal Procedure 3.170(a), (1987) 6, 21

Florida Rules of Criminal Procedure 3.440, (1987) 3, 10

Florida Statute 775.01, (1987) 2

Florida Statute 800.04 (1987) 15

Florida Statute 827.071(5), (1987) 5, 20

OTHER:

1 Charles A. Wright, Federal Practice and Procedure: Criminal 2d § 142 (1982) 10

4 W. Blackstone, Commentaries on the Laws of England 343 (1769) 2

William Hawkins' *Treatise of the Pleas of the Crown*, Ch 2. (1716) 18

OPINIONS BELOW

The opinion of the United States Count of Appeals for the Eleventh Circuit in *Exum Walker v. James Crosby*, Case No. 04-11234-E, issued on June 15, 2004, appears at Petitioner's Appendix A (Pet. App. A). No petition to rehear was filed due to the federal public defender handling the case being out of town during the period between when the opinion was issued and the deadline for filing a motion to rehear.

JURISDICTION

The Court of Appeals' judgement was entered on June 15, 2004. Pet. App. A. Justice Kennedy, on September 23, 2004, extended the time for filing the petition for writ of certiorari in this cause to and including October 29, 2004. Pet. App. B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Question I – the right to a unanimous jury verdict

CONSTITUTIONAL:

The Sixth Amendment to the United States Constitution (in pertinent part) – "In all criminal prosecutions, the accused shall enjoy...right[s]... [to a] public trial, by an impartial jury,[1] ... and to be informed of the nature and cause of the accusation ... and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution (in pertinent part) – "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens...nor deprive any person of life, liberty, or property,

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[1] This Court held that the trial by jury requires that the verdict be unanimous. *Patton v. United States*, 281 U.S. 276 at 288, 50 S. Ct. 253 at 254, 74 L. Ed. 854 (1938)

without due process of law; nor deny...equal protection of the laws."

STATE:

Florida Constitution, Art. I:

§ 9 – "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself."

§ 16(a) – "In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties the trial will take place. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law."

§ 22 – "The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law."

Florida Statute 775.01, (1987) – "The common law of England in relation to crimes, except so far as the same relates to the modes and degrees of punishment, shall be of full force in this state where there is no existing provision by statute on the subject."[2]

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[2] The common law of England held that in a jury trial, "the truth of every accusation . . . should . . . be confirmed by the unanimous suffrage . . . of [the defendant's] equals and neighbors . . . ." 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)

Florida Rules of Criminal Procedure 3.440, (1987) – "When the jurors have agreed upon a verdict they shall be conducted into the courtroom by the officer having them in charge. The court shall ask the foreperson if an agreement has been reached on a verdict. If the foreperson answers in the affirmative, the judge shall call on the foreperson to deliver the verdict in writing to the clerk. The court may then examine the verdict and correct it as to matters of form with the unanimous consent of the jurors. The clerk shall then read the verdict to the jurors and, unless disagreement is expressed by one or more of them or the jury is polled, the verdict shall be entered of record, and the jurors discharged from the cause. *No verdict may be rendered unless all of the trial jurors concur in it.*"
(Emphasis added)

Florida Rule of Criminal Procedure 3.450, (1987) – "[i]f a juror dissents, the court must direct that the jury be sent back for further consideration. If there is no dissent the verdict shall be entered of record and the jurors discharged."

Florida Standard Jury Instruction (Criminal) 2.05 – "6. Whatever verdict you render must be unanimous, that is, each juror must agree to the same verdict."

Question II – right to be informed of the nature and cause of the accusation

CONSTITUTIONAL:

The Sixth Amendment to the United States Constitution (in pertinent part) – "In all criminal prosecutions, the accused shall enjoy...right[s]... [to a] public trial, by an impartial jury,[3] ... and *to be informed of the nature and cause of the*

[3] This Court held that the trial by jury requires that the verdict be unanimous. *Patton v. United States*, 281 U.S. 276 at 288, 50 S. Ct. 253 at 254, 74 L. Ed. 854 (1938)

accusation ... and to have the Assistance of Counsel for his defense."
(Emphasis added)

The Fourteenth Amendment to the United States Constitution (in pertinent part) – "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens...nor deprive any person of life, liberty, or property, without due process of law; nor deny...equal protection of the laws."

STATE:

Florida Constitution, Art. I, § 16(a) (in pertinent part) – "In all criminal prosecutions the accused shall, upon demand, *be informed of the nature and cause of the accusation, and shall be furnished a copy of the charges*, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed."

Florida Statute 800.04, (1987) – Pet. App. C

Florida Rule of Criminal Procedure 3.140(j), (1987) – "An information upon which the defendant is the be tried which charges an offense may be amended on the option of the prosecuting attorney or defendant at any time *prior to trial* because of formal defects.
(Emphasis added)

Florida Standard Jury Instruction (Criminal) 11.10 – (lewd assault has different elements than lewd act) – Pet. App. D

Question III – double jeopardy protection against two convictions for one crime

CONSTITUTIONAL:

The Fifth Amendment to the United States Constitution provides (in pertinent part) – "No person shall...be subject for the same offence to be twice put in jeopardy..."

STATE:

Florida Constitution, Art. I –

§ 9 – "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself."

Florida Statute 827.071(5), (1987) – It is unlawful for any person to knowingly possess *any* photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, he knows to include any sexual conduct by a child.[4] Whoever violates this subsection is guilty of a felony of third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. (Emphasis and footnote added) (Pet. App. E)

Note: the Florida Supreme Court held in *State v. Watts*, 462 So.2d 813 (Fla. 1985), citing *United States v. Rosenbarger*, 536 F.2d 715 (6th Cir. 1976), *cert. denied*, 431 U.S. 965, 53 L. Ed. 2d 1060, 97 S. Ct. 2920 (1977) (As to the use of the article "a" versus the article "any," federal courts have held that the term "any firearm" is ambiguous with respect to the unit of prosecution and must be treated as a single offense with multiple convictions and punishments being precluded.) and *United States v. Kinsley*, 518 F.2d 665 (8th Cir. 1975), that when a statute makes it unlawful to possess an item and the statute prefaces that item with "any" instead of "a," the

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[4] A "child" is anyone under 18 years of age.

defendant can be charged with only one count, regardless of how many of the item he possesses. (Pet. App. F)

Florida Rules of Criminal Procedure 3.170(a), (1987) – A defendant may plead not guilty, guilty, or with the consent of the court, nolo contendere.

Question IV – double jeopardy protection from a harsher sentence on resentencing

CONSTITUTIONAL:

The Fifth Amendment to the United States Constitution provides (in pertinent part) – "No person shall...be subject for the same offence to be twice put in jeopardy..."

STATE:

Florida Constitution, Art. I:

§ 9 – "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself."

Question V – element of time protection against double jeopardy

CONSTITUTIONAL:

The Fifth Amendment to the United States Constitution provides (in pertinent part) – "No person shall...be subject for the same offence to be twice put in jeopardy..."

STATE:

Florida Constitution, Art. I:

§ 9 – "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself."

STATEMENT OF THE CASE

Petitioner's traverse through both state and federal court began almost sixteen years ago when he was charged in Florida state court with committing certain sex offenses. His state jury trial was held in May, 1990, whereupon he was found guilty and sentenced to prison and probation. He took appeals, sought post-conviction relief, and finally pursued a federal petition for writ of habeas corpus under 28 U.S.C.§ 2254, filing a *pro se* Petition for Writ of Habeas Corpus, pursuant to Title 28 U.S.C. § 2254 (hereafter § 2254 petition), and a memorandum in support thereof, in the United States District Court, Middle District of Florida, Orlando Division, on January 16, 2001. The State responded on March 1, 2001, asking the district court to dismiss the §2254 petition as untimely. Petitioner replied on March 8, 2001.

On March 13, 2001, the district court dismissed the § 2254 petition with prejudice holding that the petition was untimely filed, judgement being entered the same day. On April 24, 2001, Petitioner filed a notice of appeal and application for Certificate of Appealability. The district court denied said application on April 30, 2001. Petitioner filed his application for Certificate of Appealability to the United States Count of Appeals for the Eleventh Circuit, which held Petitioner had raised an issue of first impression and granted a Certificate of Appealability on the issues of whether individual claims within a single habeas petition may be reviewed separately for timeliness in light of *Artuz v. Bennett*, 531 U.S. 4 (2000), and whether the district court properly dismissed Petitioner's § 2254 petition as untimely filed. The Office of the Federal Public Defender was appointed to represent Petitioner and authorized to file a supplemental brief on Petitioner's behalf. After briefing, the United States Count of Appeals for the Eleventh Circuit issued a precedential opinion holding that Petitioner's petition was timely filed, reversing the lower court's decision and remanding the matter for consideration on the merits.

The district court accepted additional pleadings in connection with its substantive review of the petition, and decided against Petitioner on all issues. Petitioner filed a notice of appeal and

application for Certificate of Appealability, the district court denying the application. Petitioner filed his application for Certificate of Appealability to the United States Count of Appeals for the Eleventh Circuit, which, on June 15, 2004, also denied him (*Exum Walker v. James Crosby*, Case No. 04-11234-E) (Pet. App. A)stating only that he had failed to make a substantial showing of the denial of a constitutional right. That denial is the subject of this petition for writ of certiorari.

Petitioner, who was released from prison on June 28, 2000, currently remains under supervision while on probation in connection with his state judgement.

REASONS FOR GRANTING THE WRIT

Petitioner respectfully requests that this Court grant the petition, and either summarily reverse or set this case for briefing and argument.

This case raises important questions relating to the scope of Petitioner's rights to due process, protection from double jeopardy, and the right to a unanimous jury verdict as guaranteed by the United States Constitution as they apply to citizens charged under the laws of the various states with crimes involving liberty interests and the relevance of those clauses to the decisions by state courts and the federal courts reviewing said state court decisions. Petitioner argued below that his appellate counsel was ineffective to the point of denying him a meaningful first appeal. Petitioner supported his argument by raising four errors appellate counsel should have raised on appeal. None of these errors had been preserved during the trial and the state denied him relief arguing that the errors were not fundamental, and thus not cognizable on appeal. Petitioner argued a fifth claim below that it was error for him to receive a harsher sentence on resentencing. The United States Count of Appeals for the Eleventh Circuit has denied Petitioner a Certificate of Appealability stating simply that Petitioner had not raised any issues showing a denial of a constitutional right. The purpose of this petition for writ of certiorari is to seek an opinion from this Court acknowledging that the errors Petitioner raised below did in fact result in Petitioner

being denied his constitutional rights, and as such are fundamental error and cognizable on direct appeal regardless of preservation, this making it error for the District Court to have denied Petitioner relief based on the errors not being fundamental and making it error for the Circuit Court to have denied Petitioner a Certificate of Appealability based on a failure to make a substantial showing of a denial of a constitutional right. Petitioner's arguments follow.

I.

IT IS A DENIAL OF A CONSTITUTIONAL RIGHT FOR A CONVICTION TO BE BASED ON A GENERAL VERDICT OF GUILTY AS CHARGED WHEN THE CHARGING DOCUMENT WAS DUPLICITOUS, SAID DUPLICITY GOING UNNOTICED UNTIL POST CONVICTION, AND THE STATE OF JURISDICTION REQUIRES A UNANIMOUS JURY VERDICT TO CONVICT, AND IF SO, IS IT ERROR FOR THE CIRCUIT COURT TO DENY A FEDERAL HABEAS PETITIONER RAISING THIS ISSUE A CERTIFICATE OF APPEALABILITY BASED ON A FAILURE TO MAKE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT.

Petitioner raised below that it was error for him to have been convicted, based on a general verdict of guilty as charged, when the charging document was duplicitous, the duplicity going uncured and that his appellate counsel was ineffective for not raising it on appeal. Both the state courts and the federal courts reviewing the state court decisions have denied Petitioner relief arguing that duplicity is not fundamental error and the errors are not a denial of a constitutional right. Petitioner argues that because uncured duplicity denies a defendant in a state requiring unanimous jury verdicts a unanimous jury decision, it is a violation of Article III, Sec. 2 and the Sixth Amendment right to a unanimous jury verdict and therefore is denial of a constitutional right and is fundamental error. Petitioner offers as follows in support:

A duplicitous indictment charges two or more separate and distinct crimes in a single count. *U.S. v. Burton*, 871 F.2d 1566 (11th Cir. 1989)

While the Constitution does not set out the specific requirements of a jury trial, this Court has said that the phrase "trial by jury" requires that the verdict be unanimous. *Patton v. United States*, 281 U.S. 276 at 288, 50 S. Ct. 253 at 254, 74 L. Ed. 854 (1938). " 'The overall vice of duplicity is that the jury cannot in a general verdict render its finding on each offense, making it difficult to determine whether a conviction rests on only one of the offenses or both.' " *United States v. Marshall*, 75 F.3d 1097, 1111 (7th Cir. 1996) (quoting *United States v. Blandford*, 33 F.3d 685, 699 n.17 (6th Cir. 1994)); See also 1 *Charles A. Wright, Federal Practice and Procedure: Criminal* 2d § 142 at 475 (1982) (The vice of duplicity is that there is no way in which the jury can convict of one offense and acquit of another offense contained in the same count. A general verdict of guilty will not reveal whether the jury found the defendant guilty of one crime and not guilty of the others, or guilty of all. It is conceivable that this could prejudice [the] defendant in sentencing, in obtaining appellate review, and in protecting himself against double jeopardy.) (citations omitted).

The State of Florida requires that jury verdicts be unanimous. Florida Rules of Criminal Procedure 3.440, (1987) (No verdict may be rendered unless all of the trial jurors concur in it.)

Duplicity should be raised before trial, however, not doing so does not waive the right under Article III, Sec. 2 and the Sixth Amendment to a unanimous jury verdict. *U.S. v. Gordon*, 844 F.2d 1397 (9th Cir. 1988) "When there is such a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts, the trial judge is obligated to give curative instructions or submit special interrogatories to ensure a unanimous verdict." *United States v. Gordon*, 844 F.2d 1397 (9th Cir. 1988)

A defendant's failure to object to a duplicitous indictment may be deemed a waiver of the error, such is not a waiver of the right to a unanimous jury verdict. *United States v. Gordon*,

(Although appellants waived objection to form of duplicitous indictment, they didn't waive right under Article III, sec. 2 and the Sixth Amendment to a unanimous jury verdict.) The failure of the defendant to object when a non-unanimous verdict is returned does not prevent its being raised on appeal. *Sincox v. United States*, 571 F.2d 876 (5th Cir.1978)

When the duplicity surrounds a statute that provides for violation by different means, such as first degree murder may be premeditated murder or felony murder, the duplicity is not fundamental error, the reasoning being that there is actually one crime involved, the only question is how the defendant committed it. *See e.g. Schad v. Arizona*, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (In Arizona, first degree murder is only one crime regardless whether it occurs as a premeditated murder or a felony murder. Premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single *mens rea* element. Although a defendant is entitled to a unanimous jury verdict on whether the criminal act charged has been committed, the defendant is not entitled to a unanimous verdict on the precise manner in which the act was committed.); *United States v. Correa-Ventura*, 6 F.3d 1070 (5th Cir. 1993) ("[we find that a specific unanimity instruction was not required with respect to the identity of the firearm 'used' or 'carried' by Correa."); (*Andersen v. United States*, 170 U.S. 481 (1898) (murder conviction sustained against the challenge that the indictment on which the verdict was returned was duplicitous in charging that death occurred through both shooting and drowning. The Government was not required to make the charge in the alternative, it being immaterial whether death was caused by one means or the other.); *Borum v. United States*, 284 U.S. 596 (1932) (upholding the murder conviction of three co-defendants under a count that failed to specify which of the three did the actual killing); *St. Clair v. United States*, 154 U.S. 134, 145 (1894). This fundamental proposition is embodied in Federal Rule of Criminal Procedure 7(c)(1), which provides that "it may be alleged in a single count that the means by which the defendant committed the

offense are unknown or that the defendant committed it by one or more specified means."

Duplicity is fundamental error requiring reversal when it genuinely involves two or more separate and distinct crimes charged in a single count as opposed to simply multiple ways of committing a single crime. True duplicity deprives a defendant of his right to a unanimous jury verdict. The test for determining whether true duplicity exists is whether identical evidence will support each of crimes, and if any dissimilar facts must be proved, there is more than one offense. *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932); *Morgan v. Devine*, 237 U.S. 632, 35 S. Ct. 712, 59 L. Ed. 1153 (1915). If the two offenses being charged in separate counts would not be deemed multiplicitous, then in one count they would be duplicitous. This is the test for true duplicity.

In a case where a defendant alleges duplicity because he was convicted of a count alleging that he murdered John Doe by premeditation and by felony murder, it is clear that had he been charged with murdering John Doe by premeditation in count one and murdering John Doe by felony murder in count two, such would have been fatally multiplicitous and he would be entitled to relief. In the case at bar, Petitioner was charged with committing a lewd act it the presence of [Victim A] *or* [Victim B]. Had the state charged him with committing a lewd act in the presence of [Victim A] in one count and committing a lewd act in the presence of [Victim B] in a second count, there is no question that no multiplicity exists. Since no multiplicity exists if they were charged in separate counts, combining them into one count disjunctively is indeed duplicity, and duplicity combined with a general jury verdict of "guilty as charged" denied Petitioner his constitutional right to a unanimous jury verdict.

A case in point is *Bins v. United States*, 331 F.2d 390 (5th Cir.), *cert. denied*, 379 U.S. 880, 85 S. Ct. 149, 13 L. Ed. 2d 87 (1964). In *Bins*, the defendant was charged in one count with making, passing, uttering, and/or publishing Form 2004C *or* Form 2004G, the jury finding him "guilty as charged." The *Bins* court held that the filing of each false document would constitute a

crime, and each should be alleged in a separate and distinct count of the indictment., The court explained:

> [i]t is well settled that the test for determining whether several offenses are involved is whether identical evidence will support each of them, and if any dissimilar facts must be proved, there is more than one offense. *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932); *Morgan v. Devine*, 237 U.S. 632, 35 S. Ct. 712, 59 L. Ed. 1153 (1915). And it can hardly be denied that the making, passing, uttering, and/or publishing of F.H.A. Form 2004C requires proof of a fact other than that required to prove the making, passing, uttering, and/or publishing of F.H.A. Form 2004G. The most obvious additional fact as to each document is the fact that they are different documents. Nor is it of any consequence that all of the documents referred to in each count are part of a single transaction. The documents were executed on different dates. Whether a continuous transaction results in the commission of but a single offense or separate offenses is not dependent on the number of unlawful motives in the mind of the accused, but is determined by whether separate and distinct prohibited acts, made punishable by law, have been committed. *Caballero v. Hudspeth*, 114 F.2d 545, 547 (10th Cir. 1940). The filing of each false document would constitute a crime, and each should be alleged in a separate and distinct count of the indictment.
>
> . . .
>
> The failure to correct the duplicitous nature of the indictment in some manner was error. This becomes clear when you try to determine what the jury found. The jury cannot find a defendant guilty as to one of the offenses charged in the duplicitous count and not guilty as to the other charge in the same count; and a general verdict of guilty does not reveal whether the jury found the defendant guilty of one crime and not guilty of the

> others, or guilty of all of them. More specifically, it is impossible to determine whether the jury found appellant guilty of making, passing, uttering, and/or publishing Form 2004C, or doing so as to Form 2004G, or both.

Bins v. United States, 331 F.2d 390 (5th Cir.)

Just as the duplicity in defendant Bin's case fatally alleged criminal behavior involving two distinct forms, the duplicity in Petitioner's case fatally alleged criminal behavior involving two distinct victims. In both cases, the right to a unanimous jury verdict was denied and such denied Petitioner his constitutional right to a unanimous jury verdict, and is fundamental error. The District Court erred in concluding Petitioner's duplicity error was not fundamental and as such could not be raised on appeal and the United States Count of Appeals for the Eleventh Circuit erred in denying Petitioner a Certificate of Appealability based on it not being a denial of a constitutional right.

II.

IT IS A DENIAL OF A CONSTITUTIONAL RIGHT WHEN, DURING A TRIAL, AFTER THE STATE AND DEFENSE HAVE BOTH RESTED AND NO EVIDENCE HAS BEEN PRESENTED TO SUPPORT CONVICTION OF THE CRIME CHARGED, THE STATE CHANGES THE CHARGE TO A DISTINCTLY DIFFERENT CRIME WITH IDENTICAL PENALTY THAT EVIDENCE WAS PRESENTED TO SUPPORT CONVICTION, AND IF SO, IS IT ERROR FOR THE CIRCUIT COURT TO DENY A FEDERAL HABEAS PETITIONER RAISING THIS ISSUE A CERTIFICATE OF APPEALABILITY BASED ON A FAILURE TO MAKE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT.

Petitioner raised below that it was error for him to have been charged with one crime, then, at the end of the presentation of all evidence, for the crime charged to be changed to a different crime. Both the state courts and the federal courts reviewing the state's

decisions have denied Petitioner relief arguing that this is not fundamental error. Petitioner argues that this is a violation of his United States Fifth Amendment right to be convicted only of those offenses to which he has been indicted, his Sixth Amendment right "to be informed of the nature and cause of the accusation," and his right under the Florida Constitution "to be informed of the nature and cause of the accusation against him," and as such is a denial of a constitutional right and is fundamental error. Petitioner offers as follows in support:

According to Florida law, Lewd Assault upon a child, is an different crime from Lewd Act upon a child. The Legislature in Florida Statute 800.04 (1987) defines three offensive behaviors: 1) Lewd Assaults upon a child; 2) Lewd Acts upon a child; and 3) Lewd Acts in the presence of a child. (Pet. App. C) Under Florida law, assaults do not involve contact with the victim but the doing of an act(s) that create in the mind of the victim, reasonable fear that violence is imminent. The Legislature saw fit to separate the lewd assault statute from the section on assault and battery, section 784, et seq., Florida Statutes, and has penalized lewd assault against children as a second degree felony, making it an offense even more serious than aggravated assault, which is a third degree felony. *See Lifka v. State*, 530 So.2d 371 (Fla. 1st DCA 1988) (Lewd assault and lewd act two separate and distinct crimes.) (Pet. App. G)

The jury instructions for Lewd Assault are different from those for Lewd Act.[5] (Pet. App. D) To convict under Florida Statute 800.04, two elements must be proven. Element 1 is the same for all offenses under the statute, but element 2 is different depending on the charge. For Lewd Assault, the element is that [Defendant] "made an assault upon (victim) in a lewd, lascivious or indecent manner." Furthermore, with Lewd Assault, the jury receives the added instruction that "an 'assault' is an intentional, unlawful threat by word or act to do violence to the person of

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[5] All references here are to the 1987 jury instructions, which were those in effect at the time of Petitioner's alleged offenses.

another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." Petitioner had been put on notice to defend himself against a Lewd Assault, but not a Lewd Act upon.[6]

Florida Rule of Criminal Procedure 3.140(j), (1987) permits an Information to be amended but states specifically this must be done "prior to trial." At the close of the State's case at Petitioner's trial, no evidence had been adduced that supported the charge of lewd assault and defense counsel moved for a judgement of acquittal.[7] The trial court denied the motion and instead permitted the State to amend the Information to the new charge of lewd act upon one of the victims, based on testimony made by that victim during the trial. The jury ultimately found Petitioner guilty of the lewd act. The crimes of lewd assault and lewd act carry the same penalty so there was only prejudice and no benefit to Petitioner as a result of this. Appellate Counsel could have, and should have, raised the error on appeal but did not.

Florida recognizes convicting one of a crime not charged as a violation of constitutional due process. *See Rose v. State*, 507 So.2d 630, 631 (Fla. 5th DCA 1987) (It is elementary that the conviction of a crime not charged violates constitutional due process[8] as well as the constitutional right of the accused in all

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[6] None of the other charges against Petitioner involved Lewd Act *upon* the victim(s), only Lewd Acts in the *presence* of the victim(s).

[7] Note: The motion for acquittal at the end of all the evidence being presented would have applied to Counts 1, 2, 3, and the original Count 4 of Lewd Assault. At the time of motion to acquit, the state had not yet charged Petitioner with the Lewd Act that became the amended Count 4.

[8] *See Stirone v. United States*, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); *Cole v. Arkansas*, 333 U.S. 196, 68 S. Ct. 514, 92 L. Ed. 644 (1948); *Markham v. United States*, 160 U.S. 319, 16 S. Ct. 288, 40 L. Ed. 441 (1895); *The Schooner Hoppet and Cargo v. United States*, 11 U.S. 389, 7 Cranch 389, 3 L. Ed. 380 (1813)(Chief Justice John Marshall stated, "The rule that a man shall not be charged with one crime and convicted of another, may

criminal cases to be informed of the nature and cause of the accusation against him.[9] The violation of such constitutional rights constitutes fundamental error and is presumptively prejudicial and most certainly not within the discretion of any judge to permit.) (footnotes in original).

The Fifth Amendment provides that an accused may be convicted only of those offenses as to which a grand jury has indicted him. *United States of America v. Diaz*, 190 F.3d 1247 (11th Cir. 1999) "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury...." U.S. Const. Art. V. This commandment has three primary purposes. First, it apprises an accused of the charges that the Government will seek to prove at trial so that an adequate defense may be prepared with certainty. *See Russell v. United States*, 369 U.S. 749, 763, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962). Second, it limits the jeopardy of an accused " 'in case any other proceedings are taken against him for a similar offense [so that] the record shows with accuracy to what extent he may plead a former acquittal or conviction.' " *Id.* (quoting *Cochran v. United States*, 157 U.S. 286, 290, 15 S.Ct. 628, 39 L.Ed. 704 (1895)). Third, it provides protection against prosecutorial overreaching by guaranteeing that the criminal accusations against an individual have been "charged by a group of his fellow citizens acting independently of either prosecuting attorney or Judge." *Stirone v. United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960).

The law has strictly and consistently adhered to the rule that "a conviction cannot stand if based on an offense that is different from that alleged in the grand jury's indictment." *United States v. Miller*, 471 U.S. 130, 142, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985); see also *Stirone*, 361 U.S. at 215-19, 80 S.Ct. 270; *United States*

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sometimes cover real guilt, but its observance is essential to the preservation of innocence.")

[9] U.S. Const. amend. VI; Art. I, § 16, Fla. Const.

v. Norris, 281 U.S. 619, 622, 50 S.Ct. 424, 74 L.Ed. 1076 (1930); *Ex Parte Bain*, 121 U.S. 1, 5-14, 7 S.Ct. 781, 30 L.Ed. 849 (1887), *limited on other grounds by Miller*, 471 U.S. at 142, 144-45, 105 S.Ct. 1811; William Hawkins' *Treatise of the Pleas of the Crown*, Ch 2. (1716)

An indictment is amended in violation of the Fifth Amendment " 'when it is so altered as to charge a different offense from that found by the grand jury.' " *Miller*, 471 U.S. at 144-45, 105 S.Ct. 1811 (quoting *United States v. Ballard*, 322 U.S. 78, 90, 64 S.Ct. 882, 88 L.Ed. 1148 (1944) (Stone, J., Dissenting)).

The criminal information, which substitutes for the indictment, must likewise comply with constitutional guarantees. Specifically, the information must satisfy the defendant's Sixth Amendment right to have notice of the specific offense that he has allegedly committed so that he may defend against the case or make a fully informed plea to the charge. See, e.g., *United States v. Morales-Rosales*, 838 F.2d 1359, 1361 (5th Cir. 1988) (citing *United States v. London*, 550 F.2d 206, 211 (5th Cir. 1977));[10] *DeBenedictis v. Wainwright*, 674 F.2d 841, 842-843 (11th Cir. 1982).

It cannot be argued that defense counsel's agreement to the amendment indicates a waiver on the part of Petitioner because the record is barren of the requisite showing that the amendment was a voluntary and intelligent decision on the part of Petitioner. *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (Any waiver, by plea or otherwise, of the right to notice by indictment or information, or of the right to a jury determination of guilt beyond a reasonable doubt, must be voluntary and intelligent.) Had Petitioner been consulted on this and counsel had explained that the State had provided no evidence to support a finding of guilty on lewd assault, but there was evidence of a lewd act, and therefore the state desired to change the charge, Petitioner would certainly not

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[10] In *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982), the Eleventh Circuit adopted as binding precedent all decisions of Unit B of the former Fifth Circuit handed down after September 30, 1981.

have agreed. There would have been absolutely no benefit to the Petitioner and much prejudice of allowing such a change. Petitioner did not and would not waive his constitutional right to be informed of the charges prior to trial in this situation.

The state's changing the count from the charged crime of Lewd Assault, for which no evidence had been introduced at trial, to the different crime of Lewd Act, for which testimony during trial had been introduced, is according to the holdings of this Court, a violation of
Petitioner's Fifth Amendment right that he be convicted only of those offenses to which he has been indicted, his Sixth Amendment right "to be informed of the nature and cause of the accusation," and his right under the Florida Constitution "to be informed of the nature and cause of the accusation against him." The error denied Petitioner a constitutional right and the District Court erred in concluding the error was not fundamental and as such could not be raised on appeal and the United States Count of Appeals for the Eleventh Circuit erred in denying Petitioner a Certificate of Appealability based on it not being a denial of a constitutional right.

III.

IT IS A DENIAL OF A CONSTITUTIONAL RIGHT WHEN THE LAW OF THE STATE MAKES POSSESSING ONE OR MORE OF SPECIFIC ITEMS STATUTORILY A SINGLE CRIME, AND THE STATE CHARGES ONE POSSESSING SUCH ITEMS WITH A SEPARATE CRIME FOR EACH ITEM POSSESSED, AND THE TRIAL COURT REFUSES TO ACCEPT THE ACCUSED'S PROPER PLEA TO A SINGLE COUNT OF POSSESSING THESE ITEMS, INSTEAD FORCING HIM TO PLEAD TO MULTIPLE COUNTS, AND IF SO. IS IT ERROR FOR THE CIRCUIT COURT TO DENY A FEDERAL HABEAS PETITIONER RAISING THIS ISSUE A CERTIFICATE OF APPEALABILITY BASED ON A FAILURE TO MAKE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT.

According to Florida law at the time of Petitioner's arrest, the possession of child pornography was a single violation of the statute, regardless of the amount.[11] The State instead charged Petitioner with 28 counts, one for each photo. Petitioner attempted to plead guilty to one count in accordance with the statute, but the court refused to accept his plea. At a later date, the court accepted Petitioner's plea to two counts, the State dropping the other 26 counts. Petitioner has argued below that it was error for the trial court to refuse to accept his initial plea of guilty to one count as it violated his due process and double jeopardy rights and therefore is a violation of his constitutional rights and is fundamental error. Petitioner offers as follows in support:

The statute Petitioner was charged with violating was Florida Statute 827.071(5), (1987) – "It is unlawful for any person to knowingly possess *any* photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, he knows to include any sexual conduct by a child."[12] (Emphasis added) (Pet. App. E) The Florida Supreme Court in *State v. Watts*, 462 So.2d 813 (Fla. 1985), citing *United States v. Rosenbarger*, 536 F.2d 715 (6th Cir. 1976), *cert. denied*, 431 U.S. 965, 53 L. Ed. 2d 1060, 97 S. Ct. 2920 (1977) (As to the use of the article "a" versus the article "any," federal courts have held that the term "any firearm" is ambiguous with respect to the unit of prosecution and must be treated as a single offense with multiple convictions and punishments being precluded.) and *United States v. Kinsley*, 518 F.2d 665 (8th Cir. 1975), held that when a statute makes it unlawful to possess an item and prefaces that item with "any" instead of "a," a defendant can be charged with only one count, regardless of how many of the items he possesses. (Pet. App. F)

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[11] This law was later amended to make each item possessed a separate crime, so that possession of 10-15 photographs of a child carries a penalty greater than that of murdering the child.

[12] A "child" being anyone under the age of 18.

Petitioner's first plea was a knowing and voluntary plea of guilty to one count of violating section 827.071(5), made straight to the court, in accordance with Rule 3.170(a), Florida Rules of Criminal Procedure (1987). The power of the court to accept a plea of guilty is traditional and fundamental. *United States v. Jackson*, 390 U.S. 570, 584, 88 S.Ct 1209, 1218, 20 L.Ed.2d 138, (1968) *citing United States v. Willis*, 75 F.Supp. 628, 630 (D.C. 1948). The trial court refused to accept the plea and the court's refusal coerced Petitioner to later accept a plea to two counts of the crime, a violation of Petitioner's due process and double jeopardy rights.[13] This Court has held that a guilty plea that has been coerced and needlessly encouraged is not voluntary. *United States v. Jackson*, (The federal standard of voluntariness is violated not only when guilty plea has been coerced but also when it has been needlessly encouraged.) Due Process forbids convicting a defendant on the basis of a coerced guilty plea. *Id.* at 1209

Petitioner was prejudiced not only by having two convictions on his record instead of one, but also through his receiving two sentences instead of one, and having extra points on his sentencing guideline scoresheet, raising the guideline total.

Because the state violated Petitioner's due process right to plead guilty under Florida's Rules of Criminal Procedure, and,

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[13] Petitioner pled to some of the charges against him and went to trial on others. He was sentenced to 4½ years on those he initially pled to. If he had pled to everything initially, the maximum sentence he would have faced would have been 9 years. When he was being sentenced on those he went to trial on, the state used those he pled to as prior record, increasing his sentencing guideline range to the 22-27 year range. At that sentencing, the state offered to let him plead to two counts of the violation of 827.071(5). Although this was illegal, if Petitioner refused and later prevailed in pleading to the proper single count, the state would then have scored all the other charges as prior record and his guideline scoresheet for possessing the pictures would have been life in prison. As it was, he received 25 years at the second sentencing running consecutive to the 4½ years he originally got for a total of 29½ years in prison, resulting in a 20½ year penalty for going to trial. Clearly, if the state could get away with this, Petitioner had to accept just about any plea the state offered on the 827.071(5) charges.

thereafter coerced him to plead guilty to two counts of what was by Florida law, one crime, Petitioner's constitutional due process right to not be coerced and his double jeopardy constitutional right to not be convicted and punished more than once for a single crime were violated and this error is indeed a denial of constitutional rights. The error denied Petitioner a constitutional right and the District Court erred in concluding the error was not fundamental and as such could not be raised on appeal and the United States Count of Appeals for the Eleventh Circuit erred in denying Petitioner a Certificate of Appealability based on it not being a denial of a constitutional right.

IV.

IT IS A DENIAL OF A CONSTITUTIONAL RIGHT WHEN A DEFENDANT RECEIVES TWO CONCURRENT 30 YEAR PROBATIONARY SENTENCES ON CRIMES WITH A STATUTORY MAXIMUM SENTENCE OF 15 YEARS, AND ACCORDING TO STATE LAW, ANY PROBATION BEYOND A STATUTORY MAXIMUM IS UNENFORCEABLE SO THAT THE DEFENDANT EFFECTIVELY HAS 15 YEARS OF PROBATION TO SERVE, BUT WHEN HE ATTEMPTS TO CORRECT THE EXCESSIVENESS, THE COURT CHANGES THE PROBATIONARY SENTENCES FROM CONCURRENT TO CONSECUTIVE, SO THAT DEFENDANT HAS TO SERVE A FULL 30 YEARS OF PROBATION, A SENTENCE 15 YEARS HARSHER THAN HIS ORIGINAL SENTENCE, AND IF SO, IS IT ERROR FOR THE CIRCUIT COURT TO DENY A FEDERAL HABEAS PETITIONER RAISING THIS ISSUE A CERTIFICATE OF APPEALABILITY BASED ON A FAILURE TO MAKE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT.

Petitioner raised below that it was error for the State to resentence him to a sentence that was harsher than his original sentence. The federal courts denying Petitioner his appeal have held that this is not a denial of a constitutional right and is not

fundamental error. Petitioner argues that this is a violation of his United States Fifth Amendment right against double jeopardy and as such, the error is a denial of a constitutional right and is fundamental. Petitioner offers as follows in support:

Petitioner was sentenced to 30 years probation on each of two counts, the two sentences to run concurrently. The two counts he received these sentences on had a statutory maximum sentence of 15 years. According to Florida law, probationary sentences that are in excess of the statutory maximum, are enforceable only during the period of the sentence within the statutory maximum and void thereafter. *Taylor v. State*, 702 So.2d 487 (Fla. 1997) (a defendant could properly have probation revoked, notwithstanding the illegality of the sentence, as long as the probation violation occurred during the "legal" portion of the probationary term, but a defendant could not have probation revoked when the probation violation occurs outside the legal portion.) Thus Petitioner effectively had to serve 15 years of probation.

Petitioner raised this error to the trial court and a judge other than the one who originally sentenced him resentenced him, eliminating the excessiveness of the sentences by reducing the sentence for each count to 15 years of probation, but then he changed them from running concurrent to running consecutive. The result was that Petitioner ended up with 30 years of probation to be served instead of 15, simply because he tried to clarify the error before he began his probation. If Petitioner had done nothing, he would have had to serve a total of only 15 years of probation. After his resentencing, he has to serve a total of 30 years of probation.[14]

There can be no argument that Petitioners new probationary sentence is harsher than his original one. This Court held in *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct 2072, 23 L.Ed.2d 656

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[14] Petitioner had raised a number of issues in a postconviction motion and included the probationary issue simply to clarify his sentence. Without the other issues, he would not have filed a motion to address only the excessiveness of the two probationary sentences.

(1969), relying on *Ex parte Lange*, 85 U.S. 163, 21 L. Ed. 872 (1874) (overruled on other grounds), that although double jeopardy does not prohibit resentencing on convictions for which no punishment has been imposed, it does prohibit resentencing where punishment has already been imposed and the new sentence is harsher. *Pearce*, and its progeny, establish "a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence." *United States v. Goodwin*, 457 U.S. 368, 374, 102 S.Ct 2485, 2489, 73 L.Ed.2d 74, 81 (1982) (footnote omitted). The reasons for imposing a more harsh sentence must rely upon "identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made a part of the record so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Pearce*, 395 U.S. at 726, 89 S.Ct at 2081. At Petitioner's resentencing the judge made no mention of any "identifiable conduct on the part of [Petitioner] occurring after the time of the original sentencing proceeding," and thus did not overcome the presumption of vindictiveness.

It cannot be argued that serving 30 years of probation is not more harsh than serving 15 years of probation,[15] thus when the trial court changed Petitioner's probationary sentences from running concurrent to running consecutive, it violated his Fifth Amendment right against double jeopardy, and is indeed a denial of a constitutional right. The error therefore denied Petitioner a constitutional right and the District Court erred in concluding the error was not fundamental and as such could not be raised on appeal and the United States Count of Appeals for the Eleventh Circuit erred in denying Petitioner a Certificate of Appealability based on it not being a denial of a constitutional right.

V.

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[15] Such involves a valid liberty interest because a person on probation is precluded from certain vocational opportunities due to travel restrictions.

IT IS A DENIAL OF A CONSTITUTIONAL RIGHT WHEN THE CHARGES AGAINST A DEFENDANT ARE ALLEGED TO HAVE OCCURRED DURING A RANGE OF DATES, AND DEFENDANT GETS THE STATE TO FURTHER REDUCE THAT RANGE OF DATES THROUGH A STATEMENT PARTICULARS, AND THEN DURING TRIAL, NO EVIDENCE IS PRESENTED TO ESTABLISH ONE OF THE DATES, AND IF SO, IS IT ERROR FOR THE CIRCUIT COURT TO DENY A FEDERAL HABEAS PETITIONER RAISING THIS ISSUE A CERTIFICATE OF APPEALABILITY BASED ON A FAILURE TO MAKE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT.

Petitioner raised below that it was error for the State to allege a range of dates for when the crimes Petitioner was accused of committing occurred, further limit it through a statement of particulars, and then introduce evidence at trial as to the beginning date of the range but nothing as to the end date. Both the state courts and the federal courts reviewing the state's decisions have denied Petitioner relief arguing that this is not fundamental error. Petitioner argues that this is a violation of his United States Fifth Amendment right not to be deprived of liberty without "due process of law" and the Sixth Amendment right to a trial by jury. This Court has held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt. *Sullivan v. Louisiana*, 508 U. S. 275, 113 S.Ct. 2078, 124 L. Ed. 2d 182 (1993) (slip op., at 2-3). As such, the error is a denial of a constitutional right and fundamental. Petitioner offers as follows in support:

Pursuant to the Statement of Particulars filed by the state, the crimes Petitioner was accused of committing were alleged to have occurred between July 30, 1988 and December 25, 1988. A statement of particulars further refined the range to between July 30, 1988 and October 19, 1988. The victims testified that the crimes occurred after July 30, 1988, when the younger victim

turned five, but there was no testimony to establish the crimes occurred before October 19, 1988. One of the victims testified that he no longer went over to Petitioner's house at that time because Petitioner "was in jail." Petitioner was out on bail for nine months after the October 19, 1998 date, so that testimony does not establish the October 19, 1988 date. The mother of the two victims testified that she did not allow her children to go over to Petitioner's house after he was first arrested (October 19, 1988) but this does not establish that the alleged crimes occurred before October 19, 1988 for two reasons. First, the fact that the mother may have told her children not to go over to Petitioner's house does not mean they didn't go over there any more than if she told her children not to steal would mean they did not steal something. Second, of the four counts against Petitioner, only Count 1 and the amended Count 4 (see Question 2 elsewhere in this petition for more on that count) had testimony presented at trial that the alleged crimes occurred at Petitioner's house.[16] The jury was instructed that the state must prove the crimes occurred between July 30, 1988 and October 19, 1988. Thus, the element of time was not proven.

The element of time is fundamental to the proof to protect Petitioner's double jeopardy rights under the Fifth Amendment. *Mars v. Mounts*, 895 F.2d 1348 (11th Cir. 1990) citing *State v. Beamon*, 298 So.2d 376, 379 (Fla. 1974), *cert denied*, 419 U.S. 1124, 95 S.Ct. 809, 42 L.Ed.2d 824 (1975) This Court held in *United States v. Gaudin*, 115 S. Ct. 2310, 515 U. S. 506, 132 L. Ed. 2d 444, (1995) that the Fifth Amendment to the United States Constitution requires a jury to find a defendant guilty of all elements. See also *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979) (Evidence insufficient to prove a *prima facie* case of guilt in that state failed to prove an element of the offenses (dates) within the borders of the statement of particulars.)

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[16] The children testified that the crimes occurred on Petitioner's water bed yet Petitioner has never had a water bed.

The time element in the Information is essential to protect a violation of a defendant's double jeopardy rights. *See Russell v. United States*, 369 U.S. 749, 763, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) ([The information] limits the jeopardy of an accused " 'in case any other proceedings are taken against him for a similar offense [so that] the record shows with accuracy to what extent he may plead a former acquittal or conviction.' " quoting *Cochran v. United States*, 157 U.S. 286, 290, 15 S.Ct. 628, 39 L.Ed. 704 (1895)).

It is elementary that one crime is different from another crime as long as each has an element different from the other. In Petitioner's case, in addition to the four crimes he was charged with having committed between July 30, 1988 and October 19, 1988, he could have been charged with the exact same crimes, but with the element of time being between October 20, 1988 and July 19, 1989 and those four new crimes would have been separate crimes because of the different element of time and there would have been no double jeopardy violation. If Petitioner's case were to be thrown out or if he had been found not guilty, the state could recharge him, alleging the crimes occurred between October 20, 1988 and July 19, 1989 and then present the exact same testimony at trial and convict Petitioner. Such would clearly be miscarriage of justice, allowing the government to try someone over and over again until it got a conviction, alleging different elements of time, then simply not addressing them during the trials. Citizens of the United States are protected against such double jeopardy. The fundamental nature of the guarantee against double jeopardy can be traced to Greek and Roman times and in the common law of England before residing in the American system. Every state incorporates some form of the prohibition in its constitution or common law. The federal double jeopardy standards arise from the Fifth Amendment of the United States Constitution and also apply to the states.

The state's failure to prove the element of time at Petitioner's trial put him at risk of double jeopardy in case any other proceedings are taken against him for a similar offense so that the record shows with accuracy to what extent he may plead a former

acquittal or conviction, and as such it is a violation of his Fifth Amendment rights and is denial of a constitutional right. The error therefore denied Petitioner a constitutional right and the District Court erred in concluding the error was not fundamental and as such could not be raised on appeal and the United States Count of Appeals for the Eleventh Circuit erred in denying Petitioner a Certificate of Appealability based on it not being a denial of a constitutional right.

CONCLUSION

Petitioner has shown that each of the five specific issues he raised below are recognized by this Court as denials of constitutional rights and accordingly this Court should grant the petition for writ of certiorari, reversing the judgement of the United States Count of Appeals for the Eleventh Circuit, and grant Petitioner review of his issues on the merits.

Respectfully submitted,

/s/
David W. Collins
Florida Bar No. 475289

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Attorney for Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-11234-E

EXUM WALKER

Petitioner-Appellant

versus

JAMES CROSBY, Secretary, Department of Corrections,
CHARLIE CRIST, Attorney General of the State of Florida,

Respondents-Appellees

Appeal from the United States District Court for the Middle District of Florida

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ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

/s/ William H. Pryor
UNITED STATES CIRCUIT JUDGE

APPENDIX – A

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

September 23, 2004

Mr. Exum Walker
120 Ibis Court
Daytona Beach, FL 32119

Re: Exum Walker
v. James V. Crosby, Jr., Secretary, Florida Department of Corrections, et. al.
Application No. 04A216

Dear Mr. Walker:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on September 23, 2004 extended the time to and including October 29, 2004.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk
/s/
Ann McCumey
Case Analyst

APPENDIX – B

CHAPTER 800

LEWDNESS, INDECENT EXPOSURE

800.04 Lewd, lascivious, or indecent assault or act upon or in presence of chile; sexual battery. – Any person who:

(1) Handles, fondles, or makes an assault upon any child under the age of 16 years in a lewd , lascivious, or indecent manner;

(2) Commits an act defined as sexual battery under s. 794.011(1)(h) upon any child under the age of 16 years; or

(3) Knowingly commits any lewd or lascivious act in the presence of any child under the age of 16 years

without committing the crime of sexual battery is guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or 775.084. Neither the victim's lack of chastity nor the victim's consent is a defense to the crime proscribed by this section.

CHAPTER 827

ABUSE OF CHILDREN OR DISABLED OR AGED PERSONS

827.071 sexual performance by a child: penalties

(5) It is unlawful for any person to knowingly possess any photograph, motion picture, exhibition, show, representation, or other presentation which, in whole or in part, he knows to include any sexual conduct by a child. Whoever violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or 775.084.

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

STATE OF FLORIDA,
Plaintiff,

v. CASE NO. CR

(Defendant),
Defendant.
_____/

JURY INSTRUCTIONS

11.10 LEWD, LASCIVIOUS, INDECENT ASSAULT OR ACT UPON OR IN THE PRESENCE OF CHILD; SEXUAL BATTERY
§ 800.04, Fla. Stat. (1987)

Before you can find the defendant guilty of (crime charged), the State must prove the following two elements beyond a reasonable doubt:

Elements:

1. (Victim) was under the age of sixteen years.

Give as applicable

2. (Defendant)

Subsection (1)

Lewd Assault [made an assault upon (victim) in a lewd, lascivious or indecent manner.]

Lewd Act [handled or fondled (victim) in a lewd, lascivious or indecent manner.]

Subsection (2)

[committed an act [upon] [with] (victim) in which the sexual organ of the [(defendant)] [(victim)] penetrated or had union with the [anus] [vagina] [mouth] of the [(victim)] [(defendant)].]

[committed an act upon (victim) in which the [anus] [vagina] of (victim) was penetrated by an object.]

Subsection (3)

[knowingly committed a lewd or lascivious act in the presence of (victim).]

Definitions:

Give in all cases:

Neither the victim's lack of chastity nor the victim's consent is a defense to the crime charged.

Give when F.S. 800.04(1) is charged:

As used in regard to this offense the words "lewd," "lascivious" and "indecent" mean the same thing. They mean a wicked, lustful, unchaste, licentious or sensual intent on the part of the person doing an act.

Lewd Assault

Give when assault is charged under F.S. 800.04(1):

An "assault" is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.

Give when F.S. 800.04(3) is charged:

As used in regard to this offense the words "lewd" and "lascivious" mean the same thing and mean a wicked,

lustful, unchaste, licentious or sensual intent on the part of the person doing an act.

Note to Judge:

There is not need to make reference to the words "without committing the crime of sexual battery" because this refers to forcible sexual relations. Lanier v. State, 443 So.2d 178 (Fla. 3d DCA 1983); Chapter 84-86, Laws of Florida.

State v. Watts, 462 So.2d 813 (Fla. 1985)

SUPREME COURT OF FLORIDA

No. 64,629

STATE OF FLORIDA, PETITIONER

v.

WILLIE WATTS, RESPONDENT

January 17, 1985

Application for Review of the Decision of the District Court of Appeal - Direct Conflict of Decisions. First District - Case No. AN-15

Jim Smith, Attorney General and Richard A. Patterson and Gary L. Printy, Assistant Attorneys General, Tallahassee, Florida, for Petitioner

Michael E. Allen, Public Defender and Charlene V. Edwards, Assistant Public Defender, Tallahassee, Florida, for Respondent

Boyd, C.j., Overton, Alderman, McDONALD, Ehrlich and Shaw, JJ., Concur. Adkins, J., Concurs with an opinion.

Per Curiam.

We have for review *Watts v. State*, 440 So.2d 505 (Fla. 1st DCA 1983), which expressly and directly conflicts with decisions of other district courts of appeal and this Court. Art. V, § (b)(3), Fla. Const.

Defendant was adjudged guilty and concurrently sentenced on two counts of possession of prison made knives. The First District

Court of Appeal held that Watts was adjudged guilty on one count too many. We agree, but for different reasons.

The district court noted that defendant's possession of two knives was simultaneous in time and essentially simultaneous in space and therefore the multifaceted offense must result in a single prosecution sentence. In so holding the court adopted the "chronological and spacial relationships" test espoused by the Fifth District Court of Appeal in *Castleberry v. State*, 402 So.2d 1231 (Fla. 5th DCA 1981), to determine whether a multifaceted offense may result in a single or multiple prosecution unit. Watts v. State, 440 So.2d 505, 511 (Fla. 1st DCA 1983). The court explicitly refused to apply the reasoning used by the Second District Court of Appeal in *State v. Grappin*, 427 So.2d 760 (Fla. 2d DCA 1983), to determine whether a defendant can be convicted of two offenses for two acts which violate one statute. *Id.* at 510. However, subsequent to the First District Court of Appeal decision in Watt, we adopted both the result and reasoning of the Second District Court of Appeal in *Grappin*. *Grappin v. State*, 450 So.2d 480 (Fla. 1984). Thus we must apply the rational of *Grappin* to the case at bar.

In *Grappin*, we held that the unlawful taking of two or more firearms during the same criminal episode is subject to separate prosecution and punishment under the theft statute as to each firearm taken. Grappin was prosecuted under section 812.014(2)(b)(3), Florida Statutes (1981), which reads as follows:

> (b) It is grand theft of the second degree and a felony of the third degree, punishable as provided in ss 775.082, 775.083 and 775.084, if the property stolen is:
>
> 3. *a* firearm.

(Emphasis supplied.)

We reasoned that Grappin may be charged in a five-count information with five thefts because the article "a" prefaced

firearm. We noted that the use of the article "a" in reference to "firearm" in section 812.014(2)(b) 3 clearly shows that the legislature intended to make each firearm a separate unit of prosecution. *Id.* at 482. We specifically contrasted the article "a" with the article "any" by pointing out that federal courts have held that the term "any firearm" is ambiguous with respect to the unit of prosecution and must be treated as a single offense with multiple convictions and punishments being precluded. 450 So.2d at 482 citing *United States v. Rosenbarger*, 536 F.2d 715 (6th Cir. 1976), *cert. denied*, 431 U.S. 965, 53 L. Ed. 2d 1060, 97 S. Ct. 2920 (1977); *United States v. Kinsley*, 518 F.2d 665 (8th Cir. 1975).

Applying the rationale of *Grappin* to the instant case, it is apparent that Watt can only be charged with one count of possession of contraband. Watt was prosecuted under section 944.47, Florida Statutes (1981), which provides in relevant part:

> (1)(a) Except through regular channels as authorized by the officer in charge of the correctional institution, it is unlawful to introduce into or upon the grounds of any state correctional institution, or to take or attempt to take or send therefrom, any of the following articles which are hereby declared to be contraband for the purposes of this section, to wit:
>
> > 5. *any* firearm or weapon of any kind or any explosive substance.
>
> (c) It is unlawful for any inmate of any state correctional institution or any person while upon the grounds of any state correctional institution to be in actual or constructive possession of *any* article or thing declared by this section to be contraband, except as authorized by the officer in charge of such correctional institution.
>
> (2) Whoever violates any provision of this section is guilty of a felony of the third degree . . . .

(Emphasis supplied.)

Thus applying the a/any test of *Grappin*, we conclude that Watt may not be charged with multiple offenses for the possession of two prison made knives.

For the reasons expressed, we approve of the decision of the district court.
It is so ordered.

BOYD, C.J., OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., Concur.

ADKINS, J., Concurs with an opinion.

ADKINS, J., concurring.

The Court correctly holds that Watts is not subject to separate prosecution (and punishment) for the unlawful possession of two prison made knives under section 944.47(1)(c), Florida Statutes.

However, I disagree with the Court's reasoning used to support this conclusion. The article which prefaces a respective item of property in a given statute should not be determinative.

Rather than rely on the legislature's choice of "a" or "any", I would follow the "chronological and spacial relationships" test to determine whether a multifaceted offense may result in a single or multiple sentence. Watts possessed two prison made knives during the same time and space and therefore is not subject to separate prosecutions.

Lifka v. State, 530 So.2d 371 (Fla. 1st DCA 1988)

COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

Case No. BS-210

DAVID JOHN LIFKA, APPELLANT

v.

STATE OF FLORIDA, APPELLEE

Filed: August 8, 1988.

An appeal from Circuit Court for Duval County, Bill Parsons, Judge.

Michael E. Allen, Public Defender, and David A. Davis, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Kurt L. Barch, Assistant Attorney General, Tallahassee, for Appellee.

Zehmer, J., Wigginton, J., concurs; Booth, J., Concurs in part and dissents in part with written opinion.

Author: Zehmer

David John Lifka appeals his conviction upon a four count information after a jury trial. Each count charged that he "did handle, fondle or make an assault upon [the named victim], a child under the age of 16 years, in a lewd, lascivious or indecent manner by willfully exposing his sexual organ to her in a lewd manner, contrary to the provisions of Section 800.04, Florida Statutes." He contends that the trial court erred (1) in denying his motion for judgment of acquittal on the recited charge because the evidence

was legally insufficient to prove a lewd assault, and (2) in excluding certain evidence. Because we reverse on appellant's first point, we do not reach the second point.

The facts giving rise to the charges against Lifka, drawing all inferences most favorably for the state, may be summarized as follows. On February 4, 1986, two fourteen year old girls were walking along a street in their residential neighborhood when a young man drove slowly by them in a sports car. The car turned around near the end of the block and came back by them at a slow speed, estimated variously between 10 and 15 miles per hour. As the car slowly passed within five or six feet of the girls, the male driver raised himself from the seat and exposed his erect penis to the girls. The car continued past the girls and left the area. After arriving at the home of one of the girls, they told the mother what had happened and the police were called. The investigating officer took statements from the girls and told them to get the license number of the vehicle should this ever happen again.

Nearly three weeks later, on February 22, 1986, one of the same girls and another 14 year old girl were walking down the street in the same neighborhood when the same car approached them and slowly passed by. The car turned around in the next block and returned toward the girls at approximately 10 to 15 miles per hour, and as it passed within five feet of the girls the male driver raised himself from the seat, removed a towel from across his abdomen, and exposed his erect penis. The car continued past the girls and left the area. This time, however, the girls noted the vehicle license number, ran to a neighbor who was standing in her yard nearby and used her phone to call the mother of one of the girls. The police were called by the mother, and the investigating officer came to her house, obtained the license number, and took statements from the girls. Inquiry revealed that a sports car bearing that license number was registered in the name of appellant Lifka.

Lifka was notified by the police to come to the station for questioning and did so voluntarily. Pictures were taken of him and later shown to the girls. They identified Lifka's picture as the man

in the car, and again identified him at trial. The police officer arrested Lifka upon charges of committing a "lewd and lascivious act in the presence of a child" in violation of section 800.04, Florida Statutes (1985), which provides:

Any person who:

(1) Handles, fondles or makes an assault upon any child under the age of 16 in a lewd, lascivious, or indecent manner;

(2) Commits an act defined as sexual battery under s. 794.011(1)(h) upon any child under the age of 16 years; or

(3) Knowingly commits any lewd or lascivious act in the presence of any child under the age of 16 years without committing the crime of sexual battery is guilty of a felony in the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. Neither the victim's lack of chastity nor the victim's consent is a defense to the crime proscribed by this section.

Although the investigating officer had charged Lifka under subsection 800.04(3), relating to the commission of lewd acts, as the basis for arrest, the prosecuting attorney, for reasons not made apparent in the record or in the briefs, elected to charge Lifka under the wording of subsection 800.04(1) by alleging lewd and lascivious assaults, and to try the case solely on that legal theory.*fn1 {/Cite} There being no evidence of handling or fondling, the state argues the sufficiency of the evidence to support the conviction entirely upon the premise that it proved lewd assault in violation of section 800.04(1). The defendant, on the other hand, has argued to the court below and to this court that the evidence did not prove an essential element of assault--an overt threat to do violence--but proved only that defendant exposed his genitals in a vulgar manner in violation of section 800.03, Florida Statutes (1985), a first degree misdemeanor.

The three young girls involved testified at trial. In describing the defendant's conduct, each of them used words to the effect that "he

drove by us and exposed himself" (Tr. 26); "he exposed his penis" (Tr. 37); "we saw him lift himself up and expose his penis" (Tr. 45); "a man passed us in a blue car and exposed himself" (Tr. 81); "he exposed his penis to us" (Tr. 86, 88); "that's when he exposed himself" (Tr. 113); or "he went by and exposed himself to us" (Tr. 118). The mother of one girl testified that her daughter told her "that the car had stopped and someone had flashed her" (Tr. 73). The investigating officer said he was told by the girls that a man had "exposed himself to them" (Tr. 127). Throughout the trial the prosecuting attorney referred to the defendant as the man who exposed himself to the girls.

The girls testified that the man in the car never said anything to them (Tr. 60), and never made any overt movements to come out of the car at them or to drive the car at them or anything like that (Tr. 61, 98, 123). The car "just drove off" and "he didn't do anything" (Tr. 90). The girls did say, however, that after the defendant exposed himself they were surprised and became scared that he might come back again and do something worse.

Appellant pled not guilty, denied that he was the individual involved, and presented substantial evidence through other witnesses to support his alibi defense as to the incident that occurred on February 4. He was unable to establish an alibi defense to the February 22 incident. At the conclusion of the state's case and again at the close of all evidence, defendant's counsel moved for a judgment of acquittal on the offense charged, arguing that the evidence construed most favorably for the state completely failed to prove the assaults alleged in the information and that the evidence was sufficient to prove only vulgar exposure of one's genitals in violation of section 800.03. The trial court initially took the motion under advisement, expressing considerable difficulty with the sufficiency of the state's case to prove the alleged assaults, but eventually decided to let the matter go to the jury.[*fn2]{/Cite} The trial court, with the state's concurrence, instructed the jury on the lesser included offense of indecent exposure under section 800.03. The state did not request any instruction on the criminal offense defined in section 800.04(3),

and throughout the trial (and this appeal) has steadfastly adhered to the position that this is an assault case. The jury returned a verdict of guilty as charged on all four counts. Judge Oliff, who presided over the trial of the case, thereafter recused himself before sentencing and hearing on defendant's post trial motions. Judge Parsons, who was then assigned to the case, denied all post-trial motions.[*fn3] {/Cite}

We hold that the state's evidence was legally insufficient to prove the offense of lewd and lascivious assault defined in section 800.04(1), as charged in the information. Regardless of whether the evidence could be held to prove the commission of a lewd or lascivious act in the presence of a child in violation of section 800.04(3), see, e.g., Egal v. State, 469 So.2d 196 (Fla. 2d DCA), pet. for rev. denied, 476 So.2d 673 (Fla. 1985), the state has at all times insisted upon charging and trying this case as one involving a lewd assault proscribed by section 800.04(1). The state requested no instruction based on section 800.04(3). The trial judge, with the state's concurrence, charged the jury that before they could find the defendant guilty of the charges made, the state had to prove two elements: (1) that the girls were under the age of 16 years (which is not in dispute), and (2) that the defendant "handled or fondled" the named victim "in a lewd, lascivious or indecent manner, or that the defendant made an assaul. pon [the named victim] in a lewd, lascivious or indecent manner" (Tr. 472). The court's instructions then defined assault as follows:

An assault is defined as an intentional and unlawful threat either by word or act to do violence to the victim; and two, that at the time the defendant appeared to have the ability to carry out the threat; and three, that the act of the defendant created in the victim a well-founded fear that the violence was about to take place.

(Tr. 472). This definition is taken from the Florida Standard Jury Instructions in Criminal Cases. The court then instructed the jury on the definition of "lewd, lascivious and indecent" in accordance with these standard jury instructions. The court also instructed the jury on two lesser included offenses: (1) exposure of sexual organ

in a vulgar or indecent manner, prohibited by section 800.03, and (2) simple assault.

The state approved the instructions as given and does not question on appeal this definition of assault. It insists, rather, that the evidence was legally sufficient to prove each of the three elements of assault outlined by the trial judge, arguing as follows:

The threat [to] do violence to the victims was evidenced by the manner in which the appellant slowly drove his car past the victims, turned around and slowly drove toward the girls. The appellant also manifested his intent to do physical harm to the girls by the very fact that he exposed his erect penis to them. This was in essence a threat to do a sexual battery. The appellant's erect penis and the fact that the girls were by themselves is also evidence of the ability to carry out the threat, and that the attack was about to take place. The victims also testified that they were surprised and frightened by the actions of the appellant.

(Appellee's Brief, p. 6-7). To buttress its position, the state also suggests that "it would be realistic to imply from the actions of the appellant that he intended to pull the girls into his car [and] drive them to a secluded area and sexually batter and otherwise harm them." (Appellee's Brief, p. 7).

The law is clear that "the mere intention or opportunity to commit an assault is not enough; there must be some overt act sufficient to demonstrate a threat directed at the person placed in fear." Battles v. State, 288 So.2d 573, 576 (Fla. 2d DCA), cert. denied, 295 So.2d 302 (Fla. 1974). The state's argument in this case does no more than point out that the defendant could have committed an assault or battery; the state is unable to point to a single overt act by the defendant that constitutes a threat to do violence or injury to the girls. Every participant in this trial characterized the defendant's conduct as exposing himself or "flashing" before the girls, and nothing more. No witness gave any testimony suggesting any overt act that amounted to a threat to injure or attack anyone. No witness intimated that the manner in which the car was driven

threatened their safety. When the defendant exposed himself, he did not say anything to the girls, made no threatening gesture, and left the scene immediately after passing them. The state's argument overlooks that the February 22 incident took place near a neighbor who was standing in her yard. No doubt these young girls were surprised and became scared as a result of this bizarre occurrence, but their fear was not of what the defendant threatened he would and could then and there do; rather the fear they described was that he might turn around and come back, an act the defendant did not do. To indulge the inferences of founded threats suggested by the state on this evidence is to engage in pure speculation, which we are not permitted to do. The evidence in this case is equivocal at best and does not support the conviction of lewd assault. Cf. Munday v. State, 254 So.2d 33 (Fla. 3d DCA 1971).*fn4{/Cite}

It must be made perfectly clear that we do not for an instant condone the conduct of which the defendant was found guilty by the jury; such acts of exposure were clearly vulgar, lewd, indecent, and offensive. But it is our duty to determine whether the acts complained of constitute in law the offense of lewd assault, which was the charge brought and tried by the state. Due to the absence of any evidence of an overt threat, as defined in the instructions, we are compelled to conclude that the defendant's conduct did not constitute an assault. Because the state has chosen not to charge and try the defendant for committing a lewd or lascivious act in the presence of a child under section 800.04(3), we cannot consider whether the evidence would be sufficient to sustain a conviction under that section. We are limited to considering the charge made by the information, the lesser included offenses which were submitted to the jury at the state's request consistent with its theory of guilt, and the state's arguments in support of conviction made on appeal. At no time has the state suggested that this conviction should or could be sustained as a violation of section 800.04(3).

The evidence was obviously sufficient to support conviction of the lesser included offense of indecent exposure in violation of section

800.03. We note, however, that section 800.03 is directed at punishing the act of indecent exposure irrespective of the number of persons present; thus, the act of exposure on February 4 and again on February 22 would constitute two offenses, not four separate offenses as charged in the information. Cf. State v. Ell-Gee, Inc., 255 So.2d 542 (Fla. 3d DCA 1971).

The judgment of conviction for violating section 800.04(1) and the sentence imposed thereon is reversed, and the case is remanded for entry of a judgment of conviction and sentence for violation of section 800.03 consistent with this opinion. See Fowler v. State, 492 So.2d 1344, 1352 at n. 11 (Fla. 1st DCA 1986), review denied, 503 So.2d 328 (Fla. 1987).

REVERSED AND REMANDED.

BOOTH, J., CONCURRING IN PART AND DISSENTING IN PART.

I would affirm the conviction for lewd assault on a child as to Count III, involving the victim who was present both times defendant committed the acts leading to the charges herein. The trial court properly instructed the jury that assault is an "unlawful threat either by word or act to do violence" and that the defendant must appear to have the ability to carry out the threat and create a well-founded fear in the victim that violence was about to take place.[*fn5] {/Cite}

The majority's recitation of the evidence shows that the conduct which resulted in the defendant's apprehension was the second occurrence in three weeks. One of the girls in the second incident had been present during the first, and she immediately recognized the unusual blue-colored car as the same one driven by the man (defendant) who had exposed his genitals to the girls near the school grounds several weeks before. When the car passed her and then turned around at the corner to return, this victim became very frightened because she thought the defendant had somehow tracked her down. The defendant obviously wanted her to

recognize him and be put in fear. Initially approaching from behind, he revved the engine when his automobile was within a few feet of the victim. According to the victim, the street on which this incident took place was not well-traveled and had no sidewalks. Consequently, the girls were walking in the road, and when the defendant returned from the corner, he actually had to swerve his car around them in order to avoid hitting them. When he exposed himself this time, he raised up in the seat while swerving the car around the girls. They saw that he was not wearing pants but only a towel, which he removed.*[fn6] {/Cite} Thus, we have a defendant using his vehicle in an aggressive manner, who was larger than the victim, and who had the ability to quickly transport her from the scene if he so chose. Defendant's lewd conduct, state of nudity, and abnormal behavior understandably induced a well-founded fear in the mind of the victim that she was threatened with imminent violence to her person. I strongly disagree with the majority that defendant committed no overt acts sufficient to demonstrate a threat to the victim.

It is highly significant that Section 800.04, Florida Statutes, was specifically designed to protect children under the age of 16. The victim who was present at both assaults was 14, and the combination of acts involved here are in my view sufficient to create an objective, reasonable fear of violence in a teenager. This was more than indecent exposure. Defendant's conduct was aggressive and calculated to induce fear in the young, defenseless children he chose as his victims. Under the circumstances, I have no problem understanding why the victim believed she had been hunted down. The defendant's actions are reminiscent of a cat playing with a mouse.

Lewd assault on a child is not a specific intent crime, and the intent of the defendant can be imputed from the conduct and circumstances. Harris v. State, 418 So.2d 416 (Fla. 1st DCA 1982), review denied, 426 So.2d 26 (Fla. 1983); Egal v. State, - 469 So.2d 196 (Fla. 2d DCA 1985), review denied, 476 So.2d 673 (Fla. 1985). Section 800.01, Florida Statutes, is written to encompass acts involving victim contact, as well as acts which do

not involve victim contact. Worling v. State, 484 So.2d 94 (Fla. 5th DCA 1986). Assault does not require contact with the victim and is, by definition, the doing of an act(s) creating in the mind of the victim reasonable fear that violence is imminent. There is no requirement that the perpetrator of a lewd assault intend to commit rape or sexual battery, or that the victim of a lewd assault fear rape or any specific offense. The Legislature has seen fit to separate the lewd assault statute from the section on assault and battery, Section 784, et seq., Florida Statutes, and has penalized lewd assault against children as a second degree felony, making it an even more serious offense than aggravated assault.

Thus, the jury, under proper instructions from the court, evaluated the facts presented in this case and determined that the conduct of the defendant created a reasonable fear in the mind of the victim that violence was about to take place and, at least as to Count III, that jury verdict should stand.

APPENDIX "A" TO CONCURRING AND DISSENTING OPINION

The precise instruction given was:

Now so that you can determine if the defendant is guilty or not guilty of that crime I will define for you what an assault is. An assault is defined as an intentional and unlawful threat either by word or act to do violence to the victim; and two, that at the time the defendant appeared to have the ability to carry out the threat; and three, that the act of the defendant created in the victim a well-founded fear that the violence was about to take place.

As used in regard to this offense the word lewd, lascivious and indecent means the same thing and means a wicked, lustful, unchaste, sensuous or sensual intent on the part of the person doing the act.

In order to be convicted of this crime it is not necessary that the State prove the defendant has an intent to commit sexual battery.

The first paragraph of this definition of assault is not specific to lewd assault and is the standard jury instruction given for all types of assaults prosecuted in this state. Ch. 784, Fla. Stat.; Fla. Std. Jury Instr. (Crim.) Assault and Battery p. 87 (1987). In Willard v. State, 386 So.2d 869, 870-871 (Fla. 1st DCA 1980), this court upheld a conviction of aggravated assault, holding:

The relevant evidence presented to the Judge was that Willard went into a convenience store sometime after 2:00 A.M. and conversed with the clerk. After the clerk returned to sweeping the floor, he looked up and saw Willard walking out of the store with two six-packs of beer under his arm. The clerk went to the door and told Willard to stop, that he could not get beer at that time of the morning. Willard turned and faced him and had what appeared to be the blade of a knife in his right hand. Willard did not say anything and did not step toward the clerk or brandish the knife, but the clerk was afraid that Willard was going to stab him and he returned to the store. The two men had been about four to six feet apart. Willard then drove off.

Although we realize that this is a close case, we disagree that the evidence of aggravated assault is insufficient. . . . As for the commission of an act creating a well-founded fear of imminent violence. we believe that it is not necessary that the knife be brandished or that the perpetrator move toward the victim. . . . [T]his was, in our opinion, an act which created a well-founded fear of imminent violence on the part of the clerk. [emphasis added]

APPENDIX "B" TO CONCURRING AND DISSENTING OPINION

The foregoing resume of the evidence is based on the following testimony:

[Count III victim; first incident]

Q . . . As it [defendant's car] passed you, how far away was it when it actually was going past you?

A It was probably about five feet.

A It went up the street about a block and a half and it pulled into a driveway and it turned around.

Q After it turned around, what did the car do?

A It just started driving towards us.

Q Okay. Why were you still looking at the car?

A Because it had turned around and it scared us.

Q You were worried about the car coming at you?

A Yes.

[Count III victim; second incident]

Q Are there any sidewalks on that street?

A No.

Q Were you actually walking on the street itself?

A Yes.

Q What first drew your attention to the car? You say you saw this car again, how did that occur?

A We heard a car behind us and we turned around to look.

Q All right. And where was the car; was it behind you?

A Yes.

A He just drove past us and went up around the corner.

Q All right. And what happened then after you saw him go around the corner?

A He turned around and came back.

Q Were you watching him as he was coming back?

A As he came back around the corner we could see him.

Q Okay. Why were you watching the car?

A Because I knew it was the same car and I was scared.

Q What did you do then as he came back towards you? What happened? What did he do and what did you do?

A We just watched the car come towards us and we went --

Q How fast was he going?

A He was going slow.

Q What did the car do as it actually came up to you ?

A We were walking against traffic so he was coming right towards us. and he went around us and was up next to us.

Q And how close was he this time when he had to go around you?

A Probably about, you know, four to five feet.

Q Were you watching him as he came up to you?

A Yes.

Q What were you thinking at that time? What were you thinking?

A I was thinking that he had come after me or something, because, you know, it had happened once before.

Q And what did you see?

A We saw him lift himself up and expose his penis.

Q Okay. Did he -- did you notice if he had any clothes on this time?

A I believe he had a towel which he removed.

Q Okay. Going back just a minute, after he exposed himself to you again, what were you thinking or how were you feeling?

A I was really scared because it had been the second time that it happened and I didn't know if he was going to come back and do something worse this time or not.

[Count IV victim; second incident]

Q . . . [W]hat caused you to first notice this man in the car?

A He came up behind us and revved his engine.

Q Where was that? Was that also on Balboa?

A Yes.

Q What happened when -- did you hear him rev the engine?

A Yes.

Q Okay. What happened after he did that? What did you do?

A I turned around and saw the car.

Q . . . . When you turned around and you saw the car, it revved its engine, how far away were you from it?

A About five feet.

[emphasis added].

Opinion Footnotes

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*fn1 One reason for charging assault under section 800.04(1) rather a lewd act under section 800.04(3) may be that a charge of lewd assault focuses on the person assaulted so that a separate charge would lie as to each victim on both occasions, supporting a total of four felony charges; whereas a charge of committing a lewd act in the presence of a child focuses on the commission of the lewd act whether in the presence of one or more children, thus limiting the number of offenses that could be charged to one count for each separate incident.

*fn2 At one point during the charge conference, the trial judge explained to counsel:
I tell you quite frankly I thought about this thing a bit last night and I was convinced last night I was going to direct a judgment of acquittal; earlier this morning I thought about it some more and I was, well, not acquittal but I was going to reduce the charge, but later on today I decided that, no, it was an assault. And I tell you quite frankly now I am undecided. I think--I think it's an assault, I think it's marginally an assault. I think the State should have charged, well, I don't think it should be here to start with. You should have charged him with indecent exposure down in County Court instead of us wasting our time on something like this. And I am sincere about it, I am not just talking because I don't want this case up here. I just don't think it is a felony court case. * * * I say I think it's a County Court case, not because I don't think it might not be a felony, but because it's a case that ought to be tried there because we shouldn't be wasting your time on a low grade felony. * * * That's not why I said it shouldn't be here, not because the State hasn't made out the crime, I just don't feel as

though it's the kind of case that ought to be prosecuted in Circuit Court. It has nothing to do with the legal sufficiency of the charge. That's just part of the system. (Tr. 378-79). We can readily symphathize with the trial judge's difficulty in understanding why this case should have been brought as a second degree felony assault charge in view of the lack of evidence of any overt threat to injure the girls.

*fn3 The sentencing guidelines recommended sentence was 3 1/2 to 4 1/2 years. The defendant had no prior criminal record and Judge Parsons withheld adjudication and placed defendant on probation for five years with six months to be served in county jail, reciting that the guidelines "are outrageous when applied in the factual context." The state has not challenged the propriety of this downward departure from the guidelines sentence. Apparently the presentence investigation report indicated that the victims and their families did not want to see the defendant sent to jail for these incidents and recommended that he receive some form of counseling (Tr. 536).

*fn4 We cannot agree with the dissent's characterization of the inferences that legitimately can be drawn from the evidence of record. For example, the record simply does not establish that appellant "actually had to swerve around them [the girls] in order to avoid hitting them" and exposed himself "while swerving the car around the girls." Nor is there any evidence to sustain the characterization that appellant was "using his vehicle in an aggressive manner" as an overt act of assault. There simply is no testimony from any of the three girls involved that appellant attempted to run them down or "swerved" his car to avoid colliding with them; the only testimony is that appellant drove the car slowly by them about 5 feet away. The young girl involved in both incidents, when asked whether appellant "made any overt movements to come out of the car at you or to drive the car at you or anything like that," responded, "No" (Tr. 61). The other girl involved in the first incident also agreed that appellant "didn't try to drive the car over you or move towards you or come out of the car or anything like that" (Tr. 98). The third girl, who was

involved in the second incident, when questioned whether appellant "didn't say anything to you" and "made no movements towards you or anything like that," responded that this was correct (Tr. 123).

Furthermore, at no time in the trial court did the state contend that appellant committed an assault by using his vehicle in an aggressive manner. The state's case for assault is based on the sole contention that appellant's exposing his erect penis to the girls constitutes a lewd and lascivious assault without being accompanied by any other overt act of aggression, as is made patently clear by the opening and closing argument of the prosecutor (Tr. 393-408; 449-467).